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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO CANO et al.,

Defendants and Appellants.

B184113

(Los Angeles County
Super. Ct. No. BA274447)

APPEALS from judgments of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant Gerardo Cano.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant Andrew Ruiz.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, and Jaime L. Fuster and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, Gerardo Cano and Andrew Ruiz were convicted of possessing cocaine base for the purpose of sale in violation of Health and Safety Code section 11351.5. The jury found the gang enhancement pursuant to Penal Code section 186.22, subdivision (b)(1)(A) to be true. Cano was also convicted of various firearm offenses and found to have been armed with a firearm while in possession of the cocaine base. (Pen. Code, §§ 12021, subd. (a)(1); 12031, subd. (a)(1); 12022, subd. (c).) Cano was sentenced to six years in the state prison and Ruiz received a five-year term. Both defendants appeal from the judgments.¹

Ruiz argues the evidence is insufficient to sustain the jury finding as to the gang enhancement and the trial court erroneously allowed an officer to testify to Ruiz's admission that he was a gang member because Ruiz was not advised of his right to remain silent. (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)). We affirm the judgments.

FACTS

On November 15, 2004, Los Angeles Police Officers Alexander Alvarez, James Lopez, and Zarate, all assigned to the gang enforcement detail, were driving in a marked black and white police vehicle near 2517 Boulder Street. The area is noted for a high volume of narcotics sales and gang activity. A Chevy Astro van was stopped in the roadway and impeding traffic. A male Hispanic, later identified as Ruiz, was peering in the driver's window of the van. Officer Lopez shined a spotlight on Ruiz, who looked back and appeared to take note of the police vehicle. Ruiz immediately walked away from the van, traveled north on Boulder Street and turned onto the property at 2517 Boulder. Officers Alvarez and Zarate followed Ruiz.

¹ Cano's attorney filed a brief raising no issues on appeal and asked that we review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Counsel sent a letter advising Cano of the nature of the brief that was filed. Cano was also informed that he could seek the appointment of new counsel and file a supplemental brief. Cano has not communicated with this court. We have reviewed the record and find that appellate counsel has adequately represented Cano.

Ruiz walked down the pathway toward the rear of the location. Officer Zarate called to Ruiz, but Ruiz ignored the officer. Ruiz began to scale a fence which was at the back of the property. He placed his right hand on the fence and dropped three baggies from his left. Officer Alvarez recovered the three baggies and a black taser that was about four feet from the baggies.

Officer Alvarez noticed a second individual, later identified as Cano, peeking around a building which was behind the structure at 2517 Boulder Street. Alvarez went to the location where he had seen Cano, and observed Cano attempting to climb a chain-link fence. Cano fell from the fence and tried to scale it a second time. Alvarez heard what he believed to be a gun hitting concrete. After Cano fell from the fence a second time, he was taken into custody. Once Cano was lifted from the ground, Alvarez saw a pistol in the location where Cano had been lying. The pistol was loaded with 16 live rounds.

Officer Zarate searched Cano and recovered a clear plastic baggie from Cano's left sock. From Cano's right sock and right front pocket, Zarate found \$669 in various denominations, with the bulk of the bills being tens, fives, and ones. The officer also searched Cano for any paraphernalia that could be used to ingest narcotics, and found none. Cano was not under the influence of a controlled substance.

Officer Lopez searched Ruiz and found one \$20 bill and one \$5 bill in Ruiz's right front pants pocket. Ruiz did not have any paraphernalia used to ingest narcotics, nor was he under the influence of a controlled substance.

The three baggies dropped by Ruiz were booked in two envelopes, with two of the baggies in one and the remaining baggie in the other. The baggie found on Cano was booked separately. Two baggies booked to Ruiz contained cocaine in the base form with a net weight of 8.55 grams. The baggie booked to Cano contained cocaine in the base form with a net weight of 5.23 grams.

Officer Rudy Chavez testified the narcotics possessed by each defendant were possessed for the purpose of sale. Chavez also opined the two men were engaged in a joint effort to sell narcotics. He based his opinion on the following: (1) the location of

2517 Boulder Street was a known location of drug sales conducted by the Krazy Ass Mexican (K.A.M.) gang; (2) Ruiz lived next door at 2515 Boulder Street; and (3) sellers often work as a team to enable one member to protect the other while sales are conducted, thus one will hold and sell the narcotics while the other possesses the gun used for protection and the money. In this case, Ruiz was the seller and Cano provided the protection.

In February 2004, Officer Chavez was responsible for serving an injunction against K.A.M. gang members, and personally served Ruiz. At that time, Ruiz admitted he was a member of the K.A.M. gang. In April 2004, during a traffic stop, Officer Rafael Hernandez spoke to Ruiz, who stated, at first, that he only associated with members of the K.A.M. gang. After Officer Hernandez saw a K.A.M. gang tattoo on Ruiz's leg, Ruiz admitted he was a member of the gang.

Officer Larry Oliande was also assigned to the gang enforcement detail. His responsibilities included gathering intelligence on the gang members in the area and investigating the crimes committed by those gang members. One of the gangs in his jurisdiction was the K.A.M. gang. Officer Oliande learned about the gang, its members, and the gang's activities from street contacts with individual gang members, as well as from resources within his department and other police agencies.

Oliande stated that the K.A.M. gang had approximately 230 documented members, claimed a particular territory in the County of Los Angeles, and had a common gang sign. He testified that the primary activities of the K.A.M. gang included committing the crimes of homicide, attempted homicide, assault with a deadly weapon, robbery, and the sale of narcotics.

Relying on departmental sources and conversations with other officers, Oliande testified that Cano was a K.A.M. member. Cano was known as an O.G., a designation given to a well-respected older member of the gang. Cano had a number of tattoos which expressed his allegiance to the gang. Oliande stated that he had spoken to Officers Chavez and Hernandez, who told him that Ruiz had admitted to being a K.A.M. gang member. His membership was confirmed by documentation in a gang information

system. Ruiz also had a K.A.M. gang tattoo. Oliande noted that a nonmember of the gang would not be allowed to have such a tattoo without facing severe repercussions.

Relying on certified court documents, Oliande testified that two K.A.M. gang members, Mark Gonzalez and Jose Gonzalez, had been convicted of certain felonies. Mark Gonzalez was convicted of assault on a peace officer and Jose Gonzalez was convicted of attempted robbery.

Oliande testified Ruiz and Cano committed the crimes in question with the intent to promote or benefit the K.A.M. gang. He believed the defendants were selling narcotics as a team, with Ruiz, the younger member, serving as the runner and seller, and Cano, the older member, as the protection, armed with a firearm to fend off rival gang members or other sellers.

Oliande stated that gangs sell narcotics to raise money in order to purchase guns and support their families. The selling of narcotics in the neighborhood also helps the gang maintain its control of the neighborhood. A gang commits crimes in a location to mark its territory, which causes the community to feel intimidated.

The defense presented evidence relating to Ruiz's arrest for the underlying offense and Cano's employment. No evidence was offered as to the gang allegation.

DISCUSSION

Ruiz argues there was insufficient evidence to support the jury finding that the possession for sale of cocaine was committed for the benefit of a criminal street gang. He claims the prosecution failed to establish that the K.A.M. gang's primary activities included the crimes enumerated in Penal Code section 186.22, subdivision (e) or that the crime was carried out with the specific intent to benefit the gang. We disagree.

In determining whether there is sufficient evidence to support a criminal conviction, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557,

578.) “This standard applies to a claim of insufficiency of the evidence to support a gang enhancement. [Citation.]” (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

“To trigger the gang statute’s sentence-enhancement provision (§ 186.22, subd. (b)), the trier of fact must find that one of the alleged criminal street gang’s primary activities is the commission of one or more of certain crimes listed in the gang statute.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.) The requirement may be satisfied through expert opinion testimony that the gang’s primary activities include the commission of one of the crimes enumerated in Penal Code section 186.22, subdivision (e). (*People v. Gardeley* (1996) 14 Cal.4th 605, 620 (*Gardeley*).) The jury may also consider evidence of past or present conduct by the gang’s members involving the commission of one of the statutory crimes. (*Sengpadychith, supra*, at p. 323.) In our case, the jury heard both types of evidence.

The prosecution presented the testimony of Officer Oliande to establish that the K.A.M. gang met the statutory definition of a criminal street gang. His duties included the gathering of intelligence and the monitoring of crimes relating to the gangs in his area, one of which was the K.A.M. gang. He routinely received information from his frequent contacts with K.A.M. members, as well as from other police agencies in the surrounding jurisdictions. Oliande also personally conducted preliminary investigations of gang crimes committed by K.A.M. members. He testified, in his opinion, the gang’s primary activities included the commission of the crimes of homicide, attempted homicide, robbery, assault with a deadly weapon, and drug sales.

Officer Oliande also testified that two K.A.M. members had been convicted of crimes enumerated in the statute, assault with a firearm and attempted robbery. The jury also heard the facts of the instant offense involving the possession for sale of narcotics, another enumerated crime. Taken together, there was ample evidence to support the jury’s conclusion that the K.A.M. gang met the statutory requirements of the enhancement at issue here.

The cases cited by Ruiz are readily distinguishable. *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1004, involved an expert who gave the general opinion that the primary

activities of all gangs in his area involved the commission of crimes. He admitted the gang in question had a base of operations outside of his jurisdiction. Ruiz also relies on *In re Leland D.* (1990) 223 Cal.App.3d 251. In that case, the expert was unable to testify whether any member of the gang involved had ever committed a required predicate offense. He had heard of an incident which may have involved the target gang, but he had no personal knowledge of the facts of the case. (*Id.* at pp. 258-259.)

In contrast, Officer Oliande was responsible for monitoring the K.A.M. gang. As noted, he tracked the gang's ongoing criminal activities and conducted preliminary investigations of the crimes its members committed. His opinion was not based on hearsay or generalities, but rather on personal knowledge. Oliande's testimony was much like that offered by the prosecution and found to be sufficient in *Gardeley*.

Ruiz also relies on *People v. Perez* (2004) 118 Cal.App.4th 151. There, the only evidence presented as to the gang's primary activities was the gang's alleged involvement in three shootings during the week of the crime in question and a beating carried out six years prior. The court found this evidence was insufficient to establish the consistent and repeated criminal conduct required by the statute. Unlike the isolated activity presented in *Perez*, the jury in this case heard evidence relating to ongoing criminal conduct through Oliande's testimony. In addition, Officer Chavez testified that the apartment complex at 2517 Boulder Street was a known haven for drug sales conducted by K.A.M. members. Moreover, the jury could reasonably consider the fact that the gang's criminal activities justified the issuance of an injunction barring its members from meeting in gang territory and engaging in criminal activities, including the sale of narcotics.

Ruiz asserts the prosecution failed to establish that the offense of possession for sale was committed for the benefit of or in association with the gang within the meaning of the Penal Code. He argues the incident was merely a generic possession of drugs that had nothing to do with the gang. Not so.

Both defendants were members of the K.A.M. gang and were working as a team in their criminal enterprise. The area of the arrest was within K.A.M. territory, the site of numerous drug sales conducted by K.A.M. members. The expert opined that the manner

in which the drug sales were conducted, with Ruiz, the younger gang member possessing the bulk of the narcotics, and Cano, the older gang member with the money and the gun, established that Cano was directing Ruiz's sales activity. The sale of drugs enables the gang to purchase guns and to provide everyday sustenance to its family members. More importantly, the sale of drugs assists the gang in maintaining control over its territory. The commission of crimes in a location signals that the gang has marked the area as its own and creates fear in the community.

The evidence supports the jury finding that the crime was committed for the benefit of the K.A.M. gang within the meaning of Penal Code section 186.22.

Ruiz claims the trial court erred when it allowed Officer Hernandez to testify that Ruiz admitted he was a K.A.M. member. He argues the officer failed to advise him of his right to remain silent as mandated by *Miranda*. After a hearing on the issue, the trial court ruled that at the time of the admission Ruiz was not in custody, but was the subject of a traffic stop. As a result, an advisement pursuant to *Miranda* was not required.

Officer Hernandez testified he was involved in a traffic stop involving a car occupied by Ruiz. Hernandez's partner recognized the driver as a K.A.M. gang member. The officers were aware of the gang injunction prohibiting K.A.M. members from associating with each other, and began to ask the occupants of the car whether they were members. At first, Ruiz said he was merely an associate. Hernandez noticed a K.A.M. tattoo on Ruiz's leg. This observation caused Ruiz to admit he was a member of the gang. Although he was not sure, Hernandez testified the encounter lasted a couple of minutes.

Initially, Ruiz argues Hernandez "exceeded the permissible bounds of a traffic stop when the officer prolonged the detention and questioning." As noted by the Attorney General, Ruiz raises this contention for the first time on appeal, as he did not challenge his detention pursuant to a motion under Penal Code section 1538.5. Ruiz failed to preserve this issue for review on appeal. (*People v. Miranda* (1987) 44 Cal.3d 57, 80-81, disapproved on another point in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

As to Ruiz's claim that he was in custody and thus entitled to a *Miranda* advisement, we are not persuaded. As noted, Ruiz was the subject of a routine traffic stop. The United States Supreme Court has held that a traffic stop can be compared to a detention under *Terry v. Ohio* (1968) 392 U.S. 1, concluding that the "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 440 (*Berkemer*).)

Ruiz does not explain why the questioning in the instant case, which took place during an encounter that lasted a couple of minutes, compels a different result than that reached in *Berkemer*. Officer Hernandez, believing the occupants of the vehicle might be in violation of a gang injunction, briefly questioned Ruiz to ascertain whether Ruiz was a member of the enjoined gang. We see no difference between this scenario and the questioning approved in *Berkemer*, where an officer asked a suspected drunk driver whether he had been drinking and how much alcohol he had consumed.

In another case quite similar to ours, a passenger in a vehicle was asked a few questions after being detained for about 15 minutes. He sought to have his statements to the police suppressed, also arguing that *Miranda* warnings were required. Citing *Berkemer*, the court disagreed, finding that the questioning was merely investigatory in nature and concluding the defendant was not in custody within the meaning of *Miranda*. (*People v. Lopez* (1985) 163 Cal.App.3d 602, 608-609.)

Under the circumstances present here, Ruiz was not in custody. The trial court properly admitted the testimony of Officer Hernandez, notwithstanding the absence of a *Miranda* advisement.

DISPOSITION

The judgments are affirmed.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.